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No. 10-274

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GILLIAN B. LOYA, as Personal representative of the Estate of Ricardo D. Loya, Deceased, and as Litigation Guardian *Ad Litem for* I.L. and G.L., the Surviving Minor Children of the Decedent, Richard D. Loya, and Estate of RICHARD D. LOYA,

Petitioners,

v.

STARWOOD HOTELS & RESORTS WORLDWIDE INC., d/b/a Westin Hotel Company, d/b/a Westin Regina Golf & Beach Resort and Club Regina Westin Hotel Company d/b/a Westin Regina Golf and Spa Resort; CORPORATION MEXITURE S.A. de C.V., d/b/a Xplora Adventours Los Cabos; PADI WORLDWIDE; PADI AMERICAS; JOHN DOES, 1-5, RAINTREE RESORTS INTERNATIONAL INC., d/b/a Club Regina; WESTIN HOTEL MANAGEMENT LP; WHISKI JACK RESORTS AND CLUB; RESORT CONDOMINIUMS INTERNATIONAL LLC; DOUGLAS BECH; RAINTREE VACATION CLUB; WALKER HARMON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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1. INTRODUCTION

There are compelling reasons to grant review of the Ninth Circuit's decision. The Ninth Circuit Court of Appeals has sanctioned a District Court's dismissal of a DOHSA claim brought in admiralty by United States citizen beneficiaries for the death of a U.S. citizen on the High Seas pursuant to forum non conveniens without any assurance that the foreign jurisdiction would provide a substantially equivalent remedy to that provided by DOHSA. This is significant as this Court has long held that DOHSA was intended by Congress to provide an exclusive uniform remedy in admiralty for persons who die outside the territory of the U.S. on the High Seas.

The Ninth Circuit's adoption of "some remedy is enough" for the death of an American tourist solicited to a foreign destination in his/her home forum also conflicts with precedent from the Eighth and Eleventh Circuits. The legal standards set by the Court of Appeals in those Circuits require the District Court's to determine whether litigation by an American tourist in a foreign forum is reasonable in light of all the circumstances, including whether the American plaintiff can obtain a reasonable remedy.

I. "Some Remedy" Is *Not* Enough When Congress Provides a Specific Remedy in a Maritime Cases Under DOHSA

Significantly, Respondents' brief does not discuss modern maritime case law which requires federal courts to acknowledge the supremacy and prudential effect of maritime statutes when applying the maritime common

law. *Atlantic Sounding Co., Inc v Townsend*, 129 S.Ct. 2561 (2009); *Norfork Shipbuilding and Drydocke Corp. v Garris, 532 American Dredging Co v Miller*, 510 U.S.433, 455 (1994). The Ninth Circuit recently performed such an analysis properly in *Bowoto v Chevron Corp.*, — F.3d ——, 2010 WL 3516437 (C.A.9 (Cal.)), 10 Cal. Daily Op. Serv. 11,896, 2010 Daily Journal D.A.R. 14,397. In that case the Court of Appeals analyzed this Court's DOHSA opinions and as a result concluded that DOHSA, a maritime statute, precluded application of the general common law survivor claims which existed under the Alien Tort Claims Act. Had a similar analysis been applied by the Ninth Circuit to the procedural doctrine of forum non conveniens (which is designed to protect the district court's convenience) Loya's DOHSA claims would not have been dismissed.

In addition to this Court's decision in *Townsend*, supra., and the Ninth Circuit's opinion in *Bowoto*, supra, the Eleventh Circuit's opinion in *Misener Marine Construction, Inc. v. Norfolk Dredging Co.*, 594 F.3d 832, 2010 A.M.C. 250, 22 Fla. L. Weekly Fed. C 481, C.A.11 (Ga.), January 21, 2010 (NO. 09-10083) provides another example of the type of legal analysis which should occur when a court applies substantive maritime law. Merely announcing that a federal district court has discretion to apply forum non conveniens is not enough under the maritime law principles this Court has established with regard to determining whether DOHSA's remedy must be applied. *See* Petitioner's Opening Brief, pp. 5 - 15.

Contrary to Respondent's claims that the District Court considered DOHSA prudentially when determining whether forum non conveniens could be

used where to do so would absolutely preclude Loya's beneficiaries from obtaining the exclusive remedy Congress intended for those who die extraterritorially on the high seas[1], the district court cited cases for the proposition that it had "unfettered discretion" to apply forum non conveniens in admiralty. Pet. App. B at 37a-38a. Nor, as Respondents suggest, did the Ninth Circuit consider or acknowledge the supremacy or prudential effect of DOHSA when it affirmed dismissal of Loya's DOHSA admiralty action notwithstanding the award to Loya's beneficiaries would not be in any way equivalent to the remedy Congress intended.

Recently, this Court decided that federal courts should not attempt to "divine" whether Congress intended to apply federal statutes extraterritorially. *See Morrison v. National Australia Bank Ltd.*130 S.Ct. 2869, 177 L.Ed.2d 535, 78 USLW 4700,(2010). In doing so this Court noted that the various tests developed by the Circuits to determine whether statutes should be applied extraterritorially had resulted in the unpredictable and inconsistent application of Rule 10 (b) to transnational cases.

Where Congress has specifically provided that district courts have extraterritorial jurisdiction in admiralty over deaths that occur on the High Seas so as to insure Americans receive a uniform and fair remedy, the application of the doctrine of forum non conveniens to deprive Americans of such a remedy

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1. *See* Response brief, pp. 1 - 2 ("the district court in the underlying action did, in fact, take into account DOSHA and its purposes. Pet. App. B. at 37a - 38a.

violates DOHSA's intent to create a uniform remedy. The inconsistency of remedies allowed by the Ninth Circuit is especially inappropriate in admiralty given this courts holding Congress enacted DOHSA to obtain uniform and predictable results when Americans die on the high seas. *Offshore Logistics, Inc. v Tallentire,* 477 U.S. 207, 233 (1986) (We defer to Congress purpose in making a *uniform provision* for recovery for wrongful deaths on the high seas, an area where federal interests are primary". *See also Mobil Oil v Higginbotham,* 436 U.S. 618 625- 626 (1978).

In *American Dredging,* 510 U.S. 433 this Court found that forum non conveniens is not a characteristic feature of maritime law because "it neither originated in admiralty nor has exclusive application there." 510 U.S. at 450". This Court observed the doctrine of forum non conveniens "is procedural rather than substantive, and it is most unlikely to produce uniform results." 510 U.S. at 453. Congress intention in enacting DOHSA was to create a uniform and exclusive remedy for deaths which occurred on the High Seas. *See also Mobil Oil v Higginbotham,* 436 U.S. 618 625- 626 (1978) ("[W]e have no authority to substitute our views for those expressed by Congress in a duly enacted statute."); *Norfolk Shipbuilding & Drydock Corp. v. Garris* 532 U.S. 811, 817 (2001)

The application of the forum non conveniens doctrine in this case frustrates DOHSA because it prevents plaintiffs from obtaining the remedy Congress intended for an extraterritorial death of an American on the High Seas. Moreover, it creates unpredictability and inconsistent results with regard to whether District

Courts have to honor Congress' mandate with regard to the remedy to be afforded the beneficiaries of those Americans who die on the High Seas.

Respondents contend there is no compelling reason to grant certiorari. But this contention is wrong. Under this Court's rulings the Ninth Circuit should not have dismissed this DOHSA action. The Ninth Circuit and District Court relied on *Pain v Unitied Tech. Corp.*, 637 F.2d 775 (D.C. 1980), a case which was decided long before those cases in which this Court determined that in applying maritime common law courts should recognize the supremacy and prudential effect of maritime statutes. Even in *Pain supra. p. 794* the DC Circuit acknowledged that both Norwegian and American law provided the *same remedy* for the plaintiff, *"fair and just compensation for the pecuniary loss sustained.* See 46 U.S.C. s 762 (1976)," as stated in DOHSA. Additionally, the Court in *Pain* tacitly acknowledged that the decision was not intended to be controlling in a situation where all of the plaintiffs were American citizens or residents. *Pain supra. p. 799.*

II. The Ninth Circuit "Some Remedy is enough" for American tourists who habe been solicited abroad is inconsistent with precedent from the Eighth and Eleventh Circuits

Respondents contend that this case is simply about facts, not legal standards. Therefore, respondents argue, it is not necessary for this Court to consider the district court's "fact specific" decision. *See* Response brief, pp. 1, 5. Loya disagrees. Respondents' argument ignores the contentions Loya is making. Loya

contends the Court of Appeals in other Circuits have adopted legal standards that conflict with the Ninth Circuit's "some remedy is enough" standard for U.S. citizens. *See e.g. SME Racks, Inc. v Sistemas Mecanicos Para Electrica, S.A.*, 382 F.3d 1097 (11th Circuit 2004) ([I]n this Circuit we have long mandated that district courts " 'require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion as may exist to deny a United States citizen access to the courts of this country.'"

All four of the "tourist" forum non conveniens cases cited by Loya[2] turn on the proposition that where a Court considers conveniences, it errors if it does not specifically take into account the convenience, *i.e.* practical effects, of an American tourist having to litigate his/her case outside of his home forum. Had Loya been decided under the standards utilized by the Eighth and Eleventh circuits the District Court would have had to reach a different result. This is because, with regard to Loya's death, the "some relief" Mexico provides, can only result in a net debt with no chance of a positive recovery.

The cases Respondents cite for the proposition that Mexico is an adequate available forum all involve Mexican citizens or Americans who were doing business in Mexico, and the cases did not involve DOHSA or

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2. *Lehman v. Humphry Cayman Ltd.*, 713 F.2d 339 (*th. Cir 1983); *Reid-Whalen v. Hanse*, 933 F.2d. 1390(8th Cir. 1991); *Wilson v. Humphrey's (Cayman)*, 916 F.2d 1239 (8th Cir. 1990); and *Wilson v. Island Sea Adventure*, 590 F.3d 1264 (11th Cir. 2009).

Maritime law. Mexico is obviously a convenient forum for a Mexican national, or a person who has chosen to do business in Mexico where many of the potential defendants are not subject to the jurisdiction of the U.S. Court. But these cases cannot stand for the proposition that Mexico is a convenient forum for an American family that lives just outside Seattle, Washington, who happened to be enticed by U.S. defendants to vacation in Mexico. By requiring the Loya's to return to a forum where no net recovery is available the district court assures the end of this litigation and encourages forum shopping in almost every case where an American tourist is injured in a foreign land. Why should American companies care about keeping American tourists safe in their foreign facilities when the costs of keeping their promises with regard to safety exceeds any available damages.

There is a conflict between the circuits with regard to what standards should be applied in a forum non conveniens analysis involving an American tourist who has been solicited in his/her home state to travel to a foreign destination. That conflict is based on the following issue: Must the district court consider as part of its analysis the practicality of the American tourist litigating the case in the foreign jurisdiction? Certainly, there is a compelling interest in this Court determining the extent of the district court's discretion to deny Americans access to their home forum when they have been injured in a foreign land to which they travelled at the behest of American defendants.

CONCLUSION

This Court should grant Loya's petition for certiorari.

Respectfully Submitted,

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